IN THE

Supreme Court of the United States

October Term, 1978

No. 78-404

FIRST PENNSYLVANIA BANK N. A.,
Petitioner,

v.

GEORGE R. MONSEN, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner-Bank hereby replies to respondents' brief in opposition to the Petition for Certiorari.

The Issue For Review Was Raised And Decided Below.

Respondents argue that the Court should not grant review on the issue of whether civil liability may be imposed for aiding and abetting violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 because that issue was not raised in either the District Court or the Court of Appeals (Respondents' Brief in Opposition, p. 4). On the contrary, this issue was raised by the Court of Appeals itself in the first sentence of its opinion:

> [W]e are called upon primarily to determine the propriety of imposing sanctions on a lending institution as an aider-abettor because of that institution's actions in connection with a loan to a borrower who violated the federal securities laws. (Appendix to Petition, A3).

The Court of Appeals, in describing this situation as a "perplexing dilemma" and "conundrum" (A3), considered and decided that liability was proper. In so deciding, that court had to answer these questions: (a) Whether there is a cause of action for aiding and abetting violations of sections 12(1) and 12(2) of the Securities Act of 1933 or whether civil liability thereunder may be predicated only upon the express provisions of the Act govern-

ing direct liability and liability of controlling persons? (b) Whether the class of defendants upon whom implied liability is imposed under section 10(b) of the Securities Act of 1934 and Rule 10b-5 thereunder should be extended to an aider-abettor under these circumstances, *i.e.*, whether the class of defendants subject to such implied liability should be broadened?

These questions were decided by the courts below—in the district court's refusing to broaden the class of defendants to include the bank as an aider-abettor, and in the appellate court's enlarging the class to do so. Since the issue of such liability was decided (against Petitioner) by the Court of Appeals in reaching and deciding the above questions to find liability, that issue and those questions are properly raised now by the Petition for Writ of Certiorari.

The Petition Does Not Raise Evidentiary Questions; The Issue Is One of Liability Without Scienter.

The first two questions presented in the Petition (Petition, p. 2) do not merely ask the Supreme Court to measure the sufficiency of the evidence before the jury. Petitioner asks whether it is proper to impose civil liability on a commercial bank as an aider-abettor because the bank made secured commercial loans beginning in 1968 to a customer, admittedly knowing that the customer was also borrowing money on an unsecured basis from employees and others and issuing notes to the lenders, but without any evidence of knowledge by the Bank that the customer was thereby committing securities-laws violations.

No competent proof that the Bank knew its customer was violating the federal securities laws was possible because the promissory notes issued by Consolidated were not in 1968 deemed to be "securities" as defined in the 1933 and 1934 Acts. See, *e.g.*, *Lino v. City Investing Co.*, 487 F. 2d 689 (3d Cir., 1973). This goes to the first and second requirements of aiding-abetting liability as formulated and applied by the Third Circuit—that there has been a securities law violation and that the alleged aider-abettor had knowledge of that fact. See *Rochez Brothers, Inc. v. Rhoades*, 527 F. 2d 880, 886 (3d Cir., 1975). Since Consolidated's promissory notes were not considered by the Courts to be securities in 1968, the bank could not have known of any securities law violation by Consolidated at that time.

Even under the present state of the law, where there is a split of authority as to the relevant tests for deciding whether "notes" of this sort are securities, the situation would indeed be a conundrum and dilemma. A non-lawyer bank officer should surely not be charged with scienter of such a violation restrospectively to 1968.

Therefore this court should grant certiorari to review the issue, to answer the questions raised by the Petition, and to make more certain the law regarding liability of an aider-abettor.

Since filing of the Petition, the opinion of the Third Circuit to which the Petition is addressed has been officially reported at 579 F. 2d 793 (3d Cir., 1978).

CONCLUSION.

For the reasons set forth above, in addition to the reasons set forth in the Petition for Writ of Certiorari filed on September 8, 1978, a Writ of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: October 18, 1978.